(2)

Supreme Court, U.S.
FILED
AUG 15 1996
CLERK

No. 95-1984

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

PREFERRED MEAL SYSTEMS, INC.,
Petitioner,

v.

MARIE A. KALWAYTIS; PEGGY JACKSON;
LYDIA T. HREBEN; SHIRLEY MUSTICH,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

Where an employer violates the employee notification requirements of the Worker Adjustment and Retraining Notification Act (the "WARN Act"), 29 U.S.C. § §2101, *et seq.*, is the employer subject to liability under 29 U.S.C. §2104(a)(1)(A) for a component of damages equal to the applicable daily rate of compensation for each day of the violation period, or only for work days within the violation period?

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STATUTES

Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§2101, *et seq*. ..... *passim*

STATEMENT OF THE CASE

In addition to the factual background on the merits set forth in the Statement of the Case by Preferred Meal Systems, Inc. ("Petitioner" or "Preferred") in its Petition for Certiorari, the following procedural facts are pertinent to the issue of whether this Court should grant certiorari.

The Respondents, who are former employees of Preferred, commenced this action by filing a Complaint in the United States District Court for the Middle District of Pennsylvania alleging that Preferred violated the employee notification requirements of the Worker Adjustment and Retraining Notification Act (the "WARN Act"), 29 U.S.C. §§2101, *et seq.*, in connection with a mass layoff at Preferred's Moosic, Pennsylvania plant in 1992. The case was thereafter certified as a class action.

On the basis of reciprocal motions for summary judgment, the District Court ultimately entered a Final Judgment in favor of Respondents which included, among other relief, back pay damages calculated at sixty times each individual employee's daily rate of compensation. *See* March 1, 1995 Memorandum, Order and Final Judgment of the District Court (reprinted as Appendices C, D and E to Petition for Certiorari). These calculations had been proposed by Respondents as part of their Statement of Uncontested Facts in connection with the summary judgment motions, had been uncontested by Petitioner in the proceeding, and had been deemed as admitted pursuant to the District Court's applicable local rules. *See, e.g.*, December 9, 1994 Memorandum of the District Court, Appendix B to Petition for Certiorari, p. 30a, n. 14. No detailed facts concerning which days in the applicable period would have been non-work days for given employees were ever developed in the proceedings before the District Court.

Following the entry of the March 1, 1995 Final Judgment of the District Court which included the back pay computed on a calendar day basis, Petitioner filed a timely Notice of Appeal precisely framing the issues it was presenting for appeal to the United States Court of Appeals for the Third

Circuit. *See* Notice of Appeal (reprinted as Appendix A to this Brief, pp. 1a-2a). The listed issues did not include the issue whether back pay under 29 U.S.C. §2104(a)(1)(A) is calculated only with reference to work days. *See id.*

Petitioner's primary Brief to the Third Circuit, in its Statement of Issues, essentially repeated the limited issues Petitioner had preserved in its Notice of Appeal. *See* Statement of Issues excerpted from Petitioner's Brief for Appellant filed with the Third Circuit (reprinted as Appendix B to this Brief, p. 3a). The "work day" versus "calendar day" issue was again absent from the Statement of Issues. *See id.*

The Decision of the Third Circuit in the instant case did not directly reconsider the actual "calendar days" versus "work days" issue that it had previously decided in the case of *United Steelworkers of America v. North Star Steel Company,* 5 F.3d 39 (3d Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1060 (1994). In distinguishing the issue upon which its decision in the instant case turned from that of *North Star Steel,* the Circuit Court stated, "Because the termination date of employment was not pertinent in North Star Steel, we did not address the point, and that case does not control the resolution of the issue here." *See* Opinion of the Third Circuit, Appendix A to Petition for Certiorari, p. 7a.

REASONS FOR DENYING THE WRIT

A. THE "CALENDAR DAY" VERSUS "WORK DAY" ISSUE OF LAW URGED FOR CERTIORARI IS NOT PRESERVED OR PRESENTED IN THE RECORD BELOW WITH SUFFICIENT CLARITY TO MAKE THIS CASE AN IDEAL VEHICLE FOR ADDRESSING THAT ISSUE.

It is true that a split of authority has begun to develop on the specific issue whether under 29 U.S.C. §2104(a)(1)(A) the back pay liability of an employer who violates the WARN Act is calculated on the basis of all calendar days or only work days within the violation period. Section 5(a)(1)(A) of the WARN Act, 29 U.S.C. §2104(a)(1)(A), which makes a violat-

ing employer liable for "back pay for each day of violation," has been interpreted by the Third Circuit in *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1060 (1994), to require that back pay be calculated on the basis of all calendar days in the violation period. By contrast, the Fifth Circuit in *Carpenters District Council v. Dillard Department Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 993 (1995), took the view that back pay under that provision is calculated only with respect to work days in the violation period. The Fifth Circuit's approach was subsequently adopted by the Tenth Circuit in *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995).

Regardless of whether this Honorable Court would generally view the straightforward "calendar day" versus "work day" issue as one worthy of certiorari, however, that issue was *not* clearly pressed or directly passed upon in the instant case.

A review of the actual record shows that although Petitioner preserved and pressed a material issue about the interpretation of 29 U.S.C. §2104(a)(1)(A) in calculating WARN back pay damages, it was in a specific context that had a very different focus from the "work days" versus "calendar days" issue it now presents as a question for certiorari. The issue preserved and directly presented in the record centered on Petitioner's argument that the award of sixty days back pay damages should be reduced to reflect certain "interim earnings" allegedly received by some former employees. Specifically, Petitioner was arguing to the courts below that to the extent any of its former employees managed to obtain jobs with the contractor that it hired to replace the employees at the plant, earnings received by employees from that contractor should be taken into account to reduce back pay liability.

For example, following the District Court's entry of its Final Judgment and Order, which included the award of back pay damages calculated on a calendar day basis, Petitioner filed a Notice of Appeal delineating the issues it was preserving for appeal. In pertinent part, it provided:

> "The grounds upon which Defendant appeals are as follows:

District Court erred in awarding Summary Judgment to Plaintiffs in that:

1. No violations of the WARN Act occurred;

2. Fewer than the minimum number of employees lost employment;

3. Defendant and Culi Services, Inc. were joint employers; and

4. There were genuine issues of material fact which should have prevented an award of Summary Judgment.

[5.] District Court erred in not finding good faith by Defendant.

[6.] *District Court erred in not taking into account interim earnings of employees."*

Notice of Appeal, pp. 1-2, Appendix A to this Brief, pp. 1a-2a (emphasis added). Similarly, Petitioner's Statement of Issues in its primary Brief on the merits to the Third Circuit, framed the issues as follows:

"1. Whether the WARN Act is violated when an employer subcontracts work to a sub-contractor [sic] which in turn provides employment to most of the workers;

2. Whether Defendant and its sub-contractor [sic] were joint employers under the provisions of the WARN Act and; whether there are genuine issues of material fact concerning this which should have been resolved prior to the award of summary judgment;

3. Whether the court erred in not applying the "good faith" defense to Appellants; and

4. *Whether the District Court erred in not taking into account interim earnings of employees in assessing damages."*

Statement of Issues excerpted from Petitioner's Brief for Appellant filed with the Third Circuit, Appendix B to this Brief, p. 3a (emphasis added).

Conspicuously absent from the narrowly framed issues preserved in Petitioner's appeal to the Court of Appeals was the actual "calendar days" versus "work days" question upon which the Circuits have diverged. The closest issue raised by Petitioner was its issue about whether, under the unique cir-

cumstances of this case, any earnings received by class members from Petitioner's contractor should be subtracted from back pay damages.

Admittedly, Petitioner's demand for the setoff of interim earnings does very generally involve an interpretation of 29 U.S.C. §2104(a)(1)(A). In an esoteric sense, it also is incompatible with one portion of the logic used by the Third Circuit in its *North Star Steel* case. There, in reaching its conclusion on the separate "calendar days" issue, the Third Circuit, as one of its alternative grounds to its reasoning that the statute is unambiguous, noted its view that the WARN Act's back pay scheme does not envision a "lost earnings" approach. Petitioner's demand for a setoff cannot be squared with that reasoning.

Notwithstanding that Petitioner's setoff issue implicates the same statutory provision as the calendar day/work day issue and has a tangential connection with some of the general reasoning in *North Star Steel,* the interim earnings issue Petitioner raised in the courts below is very different from the actual "calendar days" versus "work days" issue.[1]

Although Petitioner tries to recast the instant case as a direct reincarnation of the Third Circuit's *North Star Steel* case, the Circuit Court's decision here is not susceptible to such characterization. In this case, the Third Circuit did, as a matter of background, note its general calendar day holding in *North Star Steel,* and the contrary decisions of the Fifth and Tenth Circuits. However, the Circuit Court in no way purported to revisit or actually pass upon the calendar day issue. Quite the opposite, the court expressly emphasized that the issue upon which its decision in the present case turned was distinguishable from the calendar day issue. The Court explained:

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1. Aside from being inconsistent with a piece of the reasoning in *North Star Steel,* Petitioner's interim earnings position in the lower courts is without factual support in the record and is arguably incompatible with Section 5(a)(2) of the WARN Act, 29 U.S.C. §2104(a)(2), which provides the exclusive list of setoffs from WARN back pay.

> "Because the termination date of employment was not pertinent in North Star Steel, we did not address the point and that case does not control the resolution of the issue here."

Opinion of the Third Circuit, Appendix A to Petition for Certiorari, p. 7a. Indeed, the Court of Appeals not only disavowed any controlling effect of its *North Star Steel* calendar day holding on an unrelated issue being addressed in this case concerning the date of the employment loss, it even relied upon the very *Dillard* decision that created the split of authority on the distinguishable calendar day issue. *See id.*, p. 11a.

Though the issue now being urged for certiorari might have been directly pressed for appeal and squarely treated by the Third Circuit in the instant case, it was not. Since the record does not present with clarity the actual issue now brought to this Court by the Petitioner, this case is not an appropriate one to afford a proper review of that issue. *Cf., Kimbrough v. United States,* 364 U.S. 661, *reh'g. denied,* 365 U.S. 825 (1961) (holding certiorari improvidently granted where question had not been presented with sufficient clarity below).

B. THE CURRENT RECORD IN THIS CASE, WHICH IS ON REMAND TO THE DISTRICT COURT, IS BARREN OF ACTUAL FACTS PRESENTING THE ISSUE URGED FOR CERTIORARI.

Even ignoring that the issue itself was not preserved and pressed with clarity below, this case, at least in its current posture, is particularly ill-suited for resolving the existing split of authority on the "work days" versus "calendar days" issue. This is because the actual facts needed to make that issue concrete do not exist in the record.

To permit thorough consideration of the "work days" versus "calendar days" issue in other than an abstract and hypothetical manner obviously requires a developed factual matrix containing at least the details of what days during the relevant period the employees would have worked and the nuances and circumstances of such non-work days. The record as it presently sits does not contain the actual critical facts with

respect to what days the employees in question would have worked during the "violation period" (*i.e.*, the period after the employment loss date), or even during the "notice period" (*i.e.*, the period leading up to the employment loss).[2]

In its Petition for Certiorari, Preferred raises specific factual issues, for which actual evidence and findings have not been developed on the record, concerning "regular days off" and "seasonal layoff" days. *See* Petition for Certiorari, p. 11. Indeed, at this point there are not even sufficient facts to determine what the employees' respective violation periods are, since this is dependent upon facts to be developed on remand. *See* Opinion of the Third Circuit, Appendix A to Petition for Certiorari, pp. 11a-13a.

Regarding the "seasonal layoff" factual issue, the Third Circuit's Decision below credited general assertions by Petitioner that there was some sort of seasonal layoff that came into play, but the Decision, acknowledging the current lack of a complete factual record regarding the details of the claimed seasonal layoff, remanded the case to the District Court for development of those facts.[3] Obviously, facts that would be necessary to appropriately delineate and make tangible the currently-abstract seasonal layoff issue include facts about such matters as which individuals were affected, the length of the layoffs, whether the layoffs were voluntary, and whether they were predictable from year to year. At least at this juncture, this case does not offer a sufficiently ripe set of facts even as to the seasonal layoff issue to make it a viable tool for treating the issue for which certiorari has been requested.

Regarding the factual issue concerning regular days off during the applicable period for any employees not on sea-

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2. As discussed below, Preferred, in requesting certiorari, urges a work day analysis that focuses on work days in the "notice period." This is inconsistent with the analysis in the *Dillard* and *Frymire* cases, which base WARN back pay damage calculations on work days within the "violation period" following the triggering employment loss.

3. The remand regarding the seasonal layoff issue is in order to determine the employment loss dates and, hence, how much notice had been given. It was not related to a "calendar day" versus "work day" issue under 29 U.S.C. §2104(a)(1)(A). *See* Opinion of the Third Circuit, Appendix A to Petition for Certiorari, pp.11a-13a.

sonal layoff, there are no facts in the record, and that issue is not even encompassed by the pending remand.

Petitioner's request that this Court consider the "calendar days" versus "work days" issue with only hypothetical and abstract facts to draw upon is akin to a request to this Court to render an advisory opinion. Given the immature factual record in this case, this Court should deny the Petition for Certiorari. *Cf. Conway v. California Adult Authority,* 396 U.S. 107, *reh'g. denied,* 396 U.S. 1030 (1969) (dismissing Writ of Certiorari as improvidently granted where actual record facts did not support issue).

Moreover, the peculiar factual issues overlaid into this case regarding the interplay of the independent contractor and the claimed seasonal layoff issue make this case a cumbersome and overly complex one for treating the straightforward "work days" versus "calendar days" issue. Because the pertinent facts of this case are at best cloudy and incomplete, and because of the very peculiar and inordinately complex circumstances involved, this case would not be of assistance to this Court in resolving the existing split of authority.

C. TO THE EXTENT THAT THE ISSUE FRAMED BY PETITIONER FOCUSES UPON WORK DAYS DURING THE "NOTICE PERIOD" AS OPPOSED TO THE "VIOLATION PERIOD," IT IS DISTINGUISHABLE FROM THE ISSUE DIVIDING THE CIRCUITS.

Though it is somewhat ambiguous, the issue framed for your Honorable Court by Petitioner—both on its face and when assessed in view of the argument advanced by Petitioner in support of its request for certiorari—appears to be focusing on whether calendar days or work days during the *notification period* should determine WARN back pay. If Petitioner actually does intend to assert an issue focusing on the notification period, which is the period of time prior to the employment loss, as opposed to focusing on the "violation period" following the employment loss, that issue is distinguishable from the one upon which the circuits have split.

In this regard, Petitioner's statement of the "question presented" refers somewhat ambiguously to the "improper notice period" as the time frame at issue. In its argument for why certiorari should be granted, Petitioner argues, in pertinent part:

> "Specifically, the Third Circuit's opinion would require payment for days the Respondent would have been on *normal seasonal layoff,* and for *regular days off* during the *notice period."*

Petition for Certiorari, p. 11 (emphasis added to "notice period"). The notification period under the WARN Act is the sixty-day period preceding the employment loss constituting part of a plant closing or mass layoff. *See, e.g.,* 29 U.S.C. §2102(a) (requiring notice prior to plant closing or mass layoff).

The Fifth Circuit's *Dillard* decision and the Tenth Circuit's *Frymire* decision, in rejecting the Third Circuit calendar day approach, focused on work days during the "violation period" following the triggering employment losses, as opposed to during the notice period preceding the employment losses. The *Dillard* decision explained as follows:

> "As the Conference Report clearly states, the violation period is composed of those days *after* the employee has been terminated or *after* the employee's hours have been substantially reduced without adequate notice. . . . Section 2104(a)(2) allows an employer to deduct wages earned for work performed *during* the violation period."

Dillard, 15 F.3d 1275, 1284 n. 14 (5th Cir. 1994), *cert. denied,* ____ U.S. ____, 115 S.Ct. 993 (1995) (citation omitted) (emphasis in original).

Accordingly, to the extent Petitioner may be attempting to assert an issue focusing on the notice period prior to the mass layoff, any such issue would be distinguishable from the issue that has begun to divide the circuits and would not be a substantial enough issue to warrant certiorari.

CONCLUSION

For all the reasons set forth above, the Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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Dated: August 14, 1996

Appendix

APPENDIX A

PETITIONER'S NOTICE OF APPEAL FILED WITH THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN and SHIRLEY MUSTICH, Plaintiffs	:	CASE NO. 3:CV-93-371 **NOTICE OF APPEAL**
v.	:	
PREFERRED MEAL SYSTEMS, INC., a Delaware Corporation, Defendant	:	

PREFERRED MEAL SYSTEMS, INC., Defendant, appeals to the United States Court of Appeals for the Third Circuit, from the Final Order dated March 1, 1995 by Judge Vanaskie in the United States District Court for the Middle District of Pennsylvania. The parties to the Order appealed from and the names and addresses of their respective attorneys are as follows:

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The grounds upon which Defendant appeals are as follows:

District Court erred in awarding Summary Judgment to Plaintiffs in that:

1. No violations of the WARN Act occurred;

2. Fewer than the minimum number of employees lost employment;

3. Defendant and Culi Services, Inc. were joint employers; and

4. There were genuine issues of material fact which should have prevented an award of Summary Judgment.

District Court erred in not finding good faith by Defendant.

District Court erred in not taking into account interim earnings of employees.

Dated: South Orange, New Jersey
March 29, 1995

/S/ Stuart Bochner

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APPENDIX B

STATEMENT OF ISSUES EXCERPTED FROM PAGES 1 AND 2 OF PETITIONER'S BRIEF FOR APPELLANT FILED WITH THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF ISSUES

The issues presented by this appeal pertain to the application of the WARN Act to circumstances under which an employer sub-contracts work to a sub-contractor which in turn provides employment to most of the employer's employees. Specifically, the issues raised by this appeal are as follows:

1. Whether the WARN Act is violated when an employer subcontracts work to a sub-contractor which in turn provides employment to most of the workers;

2. Whether Defendant and its sub-contractor were joint employers under the provisions of the WARN Act and; whether there are genuine issues of material fact concerning this which should have been resolved prior to the award of summary judgment;

3. Whether the court erred in not applying the "good faith" defense to Appellants; and

4. Whether the District Court erred in not taking into account interim earnings of employees in assessing damages.